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Supreme Court, U.S.
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No. 92-898

In The

Supreme Court of the United States

October Term, 1992

ALIMADAD JATOI and ALCINA JATOI,

Petitioners,

vs.

AMEGA CONSTRUCTION, INC.

and

AETNA INSURANCE COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT AETNA INSURANCE COMPANY

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36 pp $ 10

QUESTIONS PRESENTED

1. Whether a litigant who has voluntarily settled a case in open court can renege on that settlement by claiming that the District Court's conduct of trial proceedings coerced the settlement and denied him due process of law.

2. Is a Court of Appeals correct in affirming the denial of a Rule 60(b) Motion and sanctioning a litigant for filing a frivolous appeal where the litigant has used Rule 60(b) to seek reversal of a District Court's judgment which was previously upheld on appeal?

The remaining questions presented to this Court by Petitioner (Petitioner's Questions 2 and 4) are not addressed in this brief since they were the subject of two other determinations by the United States Court of Appeals for the Fifth Circuit in Cases Nos. 91-1086 and 91-1057. On November 18, 1991, Justice Scalia denied Petitioner's application for an extension of time within which to file a petition for a writ of certiorari, thereby prohibiting review of a petition for a writ of certiorari for Case No. 91-1086 and Petitioner's Question No. 2. Moreover, on April 23, 1992, the Fifth Circuit denied Petitioner Alcina Jatoi's Motion to File Brief Out of Time and granted Respondent Amega Construction, Inc.'s Motion to Dismiss the Appeal. Pursuant to Supreme Court Rule 13.4, Petitioner Alcina Jatoi's time for filing a petition for a writ of certiorari on the community property issue (Jatoi's question No. 4) expired on July 23, 1992.

LIST OF PARTIES

The undersigned counsel of record certifies that the following listed persons were parties to the proceeding in the court the judgment of which is sought to be reviewed.

Aetna Insurance Company – Third Party Defendant/ Respondent

Amega Construction, Inc. – Plaintiff/Respondent

Benedict Industries, Inc. – Intervenor/Respondent

Pioneer Concrete of Texas, Inc. – Intervenor/Respondent

Alimadad Jatoi – Co-Defendant/Petitioner

Alcina Jatoi – wife of Alimadad Jatoi, Co-Defendant/ Petitioner,

The Jatoi Partnership – Co-Defendant

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STATEMENT OF THE CASE

I. Procedural History

The United States Court of Appeals aptly summarized the tangled and tortured course of this litigation as a "lengthy litany of ludicrous litigiousness" of which it is hoped that this petition by Petitioners, Alimadad Jatoi and Alcina Jatoi ("Jatoi"), is the last invocation. Despite having been sanctioned by the Fifth Circuit for the absurdity of his appeals from his voluntary settlement, Jatoi doggedly persists in dragging Respondent, Aetna Insurance Company ("Aetna"), and Respondent, Amega Construction, Inc. ("Amega"), through yet another briefing of his tired arguments. While it is true that the United States Constitution guarantees to every person the right to redress their grievances in court, it is inconceivable that those drafting the Fifth Amendment envisioned that the right would be abused to the extent it has been in this case by Jatoi. The filing of this Petition for a Writ of Certiorari is Jatoi's eighth attempt to obtain nullification of a voluntary settlement he entered into, in open court, in November 1990.[1]

This litigation originated in 1985 in the 236th Judicial District Court of Tarrant County, Texas when Amega brought suit against Jatoi, seeking recovery of the balance of a contract for the construction of an office building. Amega also sought foreclosure of mechanics liens filed

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[1] Due to the shear absurdity and complexity of Jatoi's abuses of the judicial process, a flow chart is attached as Appendix A in order to aid the Court in sifting through Jatoi's "smoke and mirrors" which have been used by him in an attempt to camouflage his dishonest and questionable business practices.

against the project to secure the outstanding contract balance. Jatoi counterclaimed, alleging that Amega breached the Jatoi-Amega contract by failing to perform work in compliance with the plans and specifications of the construction contract. Jatoi also sought recovery under the Texas Deceptive Trade Practices and Consumer Protection Act ("DTPA").

Approximately $1,250,000 of the proceeds from the Jatoi construction loan, an amount sufficient to cover the amount of the liens against the property, were escrowed by USLife Title Company at the closing on Jatoi's permanent financing. These funds were later deposited into the registry of the United States District Court for the Northern District of Texas, Fort Worth Division, and the parties' entitlement to those funds was the basic issue which was eventually tried to that Court.

In November, 1986, the State District Court ordered the payment of the claims of unpaid subcontractors which had intervened in the litigation. The claims between Amega and Jatoi were set for trial in state court in June, 1987, but in an eleventh hour attempt to delay trial, Jatoi filed a third party petition against Aetna which had issued payment and performance bonds for Amega for the project. Jatoi asserted a breach of contract action against Aetna on the bonds, as well as breach of the covenant of good faith and fair dealing, and violation of Art. 21.21 of the Texas Insurance Code and the DTPA. Aetna counterclaimed against Jatoi for its attorneys' fees for the bad faith filing of causes of action under Art. 21.21 and the DTPA.

On August 4, 1987, Jatoi filed a voluntary petition under Chapter 11 of the Bankruptcy Code. The case was then removed to the United States District Court for the Northern District of Texas, Fort Worth Division, and was referred to the United States Bankruptcy Court. After Jatoi added a RICO claim to his causes of action against Amega, the District Court, on Motion of Aetna, withdrew the reference on April 15, 1988, placing the case on the District Court's docket for trial.

Trial commenced on November 5, 1990, before the Honorable Judge John McBryde. On the evening of November 7, 1990, after both Amega and Jatoi presented part of their respective cases, a settlement was reached between the parties as to the disposition of the funds in the registry of the Court. At that time all parties affirmed the settlement in open court. Jatoi himself acknowledged his agreement to the settlement on the record. The terms of the settlement were confirmed in a final order dismissing with prejudice all claims in the litigation which was entered by the Court on November 8, 1990. Despite his open court affirmation of the settlement, Jatoi filed a Motion for New Trial or to Alter or Amend the Judgment on November 19, 1990. The District Court denied that motion on December 17, 1990.

Jatoi appealed the denial of the Motion for New Trial or to Alter or Amend the Judgment to the Fifth Circuit on January 16, 1991. The case was assigned Case No. 91-1086. While the Court considered the appeal, on May 5, 1991, Jatoi filed a Rule 60(b) Motion with the District Court. On June 25, 1991, Jatoi's Rule 60(b) Motion was denied. Undaunted, Jatoi filed a Motion for Reconsideration of his Rule 60(b) Motion in the District Court on July

1, 1991. On August 8, 1991, the District Court denied the Motion for Reconsideration. On August 23, 1991, the Fifth Circuit affirmed the December 1990 denial of the Motion for New Trial in Case No. 91-1086. In the meantime, on October 21, 1991, the District Court informed all parties that the record on Jatoi's Rule 60(b) Motion had been filed with the Fifth Circuit. This appeal was given Case No. 91-7003.

Apparently, Jatoi did not think two appeals of the same issues were enough, so on November 5, 1991, Alcina Jatoi, obviously at the behest of her husband, filed her own Rule 60(b) Motion with the District Court. In her motion, Alcina Jatoi raised essentially the same grounds for vacation of the District Court's order confirming the voluntary settlement of the litigation as were raised in Alimadad Jatoi's Rule 60(b) Motion (now Case No. 91-7003) *and* those raised in the 91-1086 appeal. While Alcina Jatoi's motion was pending before the District Court, Jatoi requested an extension of time from this Court to file a petition for a writ of certiorari asking this Court to review the determination of the Fifth Circuit in Case No. 91-1086 and, consequently, the trial court's entry of the order regarding the voluntary settlement. Jatoi's request was denied by Justice Scalia on November 18, 1991.

On December 7, 1991 Jatoi received notice that the District Court denied Alcina Jatoi's Rule 60(b) Motion. A third appeal was filed by Jatoi in January, 1992, appealing the denial of Alcina Jatoi's Rule 60(b) Motion. The case was given Case No. 92-1057 by the Fifth Circuit. In April 1992, the Court denied Alcina Jatoi's Motion to File Brief Out of Time. The Fifth Circuit was now becoming weary

of Jatoi's frivolous procedural wranglings, as were Aetna and Amega which filed motions for sanctions with the Fifth Circuit.

In June 1992, the Fifth Circuit correctly dismissed 91-7003 and sanctioned Jatoi for filing a frivolous appeal indicating that his "ludicrous litigiousness" must end. In July 1992, Jatoi, despite the warnings of the Fifth Circuit, filed his Petition for a Writ of Certiorari which is now the subject of this Court's review. The first brief filed by Jatoi in September 1992 failed to conform to this Court's requirements and a corrected and redrafted brief was served upon Aetna on November 24, 1992. It is this brief to which Aetna now responds.[2]

II. Statement of Facts

This fourth appeal involves yet another attempt by Jatoi to undo a settlement into which he entered voluntarily after three days of trial. Over the course of those three days, it became patently obvious to every person in the courtroom – Judge, jury, parties, counsel and finally Jatoi himself – that Jatoi had no chance of prevailing on the merits. Faced with the possibility of no recovery on

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[2] It is Aetna's understanding from its counsel's discussion with the office of the Clerk of this Court that it need not respond to aspects of Jatoi's Petition which deal with Case No. 91-1086 or 92-1057 since time has expired on those Appeals. Thus Aetna does not respond to Jatoi's Questions Nos. 2 and 4. Further, it is Aetna's understanding that the time period for responding to Jatoi's Petition began to run on the date that the redrafted brief was received by Aetna on November 24, 1992. Attached at Appendix B to this brief is Aetna's counsel's correspondence, dated December 10, 1992, confirming this understanding.

his own claims against Amega and Aetna, or worse yet, a judgment against him for attorneys' fees of Amega, and even Aetna, Jatoi accepted a settlement offer to which he himself agreed on the record in open court. Trial Transcript, Vol. III, Page 334.[3] By way of appeal (for the fourth time) Jatoi now seeks to renege on that settlement, claiming that the conduct of the trial by the District Court was so unfair that Jatoi was coerced into settling.

The transcript, when read as a whole, simply does not support Jatoi's claims and never has. Rather, the transcript establishes that even though it maintained relatively strict controls over the proceedings, the District Court treated all parties fairly and equally. It was the woeful lack of merit of Jatoi's claims which led to a settlement of the case prior to its submission to the jury. Throughout the arguments made in his Petition for a Writ of Certiorari, Jatoi attempts to paint a picture of biased and unfair treatment by the District Court of both Jatoi and his counsel leading to his counsel's "abandonment" of him. Upon review of the record, however, it becomes clear that the settlement was by no means involuntary. Rather, it was made as a result of strategy in light of the course which the trial proceedings had taken, a course adverse to Jatoi.

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[3] References to the transcript of the trial will be designated "Tr.Vol. ___."

SUMMARY OF ARGUMENT

Jatoi claims that the voluntary settlement he entered into two years ago should be nullified because the District Court's actions intimidated both him and his counsel. Specifically, Jatoi claims that the District Court's actions in controlling the proceedings, excluding evidence, advising Jatoi as to his Fifth Amendment rights and intimidating his counsel coerced him into settling. Jatoi also claims that the sanctions imposed upon him by the Fifth Circuit in the second appeal of the same issues were inappropriate.

The Fifth Circuit Court of Appeals three times rejected Jatoi's feeble attempts to blame the District Court for coercing a settlement. In its first opinion in Case No. 91-1086, the Fifth Circuit stated the law of the case which is binding upon Jatoi, i.e., that the District Court's comments concerning settlement were well within its discretion. The same is true of Jatoi's claim regarding the District Court's careful instructions to him as to his Fifth Amendment rights. The Fifth Circuit, on the 91-1086 appeal, resoundingly rejected Jatoi's contention that through this instruction, the District Court intimidated him and his counsel to the point that they settled. The Fifth Circuit twice found this contention to be "frivolous." Jatoi must be barred from pursuing this frivolous argument based on the law of the case.

Jatoi complains of other conduct on the part of the District Court which he claims to be coercive, including the Court's exclusion of evidence pertaining to Jatoi's interpretation of the contract documents; refusal of the

District Court to allow repetitious and cumulative testimony; and the Court's threat of contempt to Jatoi's trial counsel for numerous side-bar remarks. This conduct was raised as a ground for relief for the first time in Jatoi's Motion for Rule 60(b)(6) relief. Jatoi's contentions in this regard are equally frivolous as found by the Fifth Circuit in its unpublished opinion from which this appeal is taken. Faced with the same worn out arguments as the prior appeal (Case No. 91-1086), the Fifth Circuit clearly did not abuse its discretion in dismissing Jatoi's second appeal and sanctioning such conduct.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN DISMISSING JATOI'S APPEAL AND SANCTIONING JATOI SINCE THE TRIAL COURT'S CONDUCT IN THIS CASE WAS NOT COERCIVE OR IMPROPER AND DID NOT OTHERWISE INTIMIDATE JATOI OR HIS COUNSEL SUCH THAT THE SETTLEMENT REACHED IN THE COURT BELOW SHOULD BE NULLIFIED.

The Fifth Circuit found Jatoi's allegations that the District Court acted improperly to be meritless. Due to the fact that such allegations had already been presented to the Court once, the Fifth Circuit found Jatoi's arguments to be "unsupported, conclusory accusations of misfeasance and malfeasance" were "wasteful and abusive." See Jatoi's Appendix B, 80-81. The record below clearly demonstrates the weak position of Jatoi before the jury

and both Jatoi and his trial counsel saw the writing on the wall so they settled.

This Court's review of the determination as to the voluntary nature of the settlement is governed by standards set out in Fed. R. Civ. P. 61, which provides that no action by the trial court is ground for vacating or modifying a judgment or order, "unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." A trial court's action on a Rule 60(b) Motion can be set aside only for a clear abuse of discretion by the trial court. *Edwards v. Joyner,* 566 F.2d 960 (5th Cir. 1978); *Hand v. United States,* 441 F.2d 529 (5th Cir. 1971).

Rule 60(b)(6) provides for an extraordinary remedy and may be invoked only upon a showing of exceptional circumstances. *Ackermann v. United States,* 340 U.S. 193, 202 (1950). In *Ackermann,* the United States Supreme Court stated that even though hindsight may indicate to a litigant that his decision was probably wrong, "there must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from." *Id.* 340 U.S. at 198-99. Likewise, Jatoi should not be allowed to relieve himself of his own choice to settle this case at the expense of Aetna and Amega.

The District Court's actions and its Order should be accorded even greater deference under the above standards of review due to the long and protracted history of this case which concluded with an agreed settlement, not

to mention the tortured path of the appeals taken in this matter. Federal courts have traditionally exercised the power to encourage settlement, and the court's role in the settlement process was codified in the 1983 amendments to Fed. R. Civ. P. 16 when Subsection (c)(7) was added to encourage pretrial settlement discussions. *Kothe v. Smith,* 771 F.2d 667 (2nd Cir. 1985). The District Court's comments to the parties as to settlement never went beyond the spirit of Rule 16 (Tr.Vol. III-324), and certainly nowhere near the level of coercion in the *Kothe* case, the case upon which Jatoi places primary reliance.

Jatoi cites *Kothe v. Smith* for the universal proposition that judges should not strong-arm settlements of civil lawsuits by coercion. However, beyond this generally accepted legal chestnut, the case does little to support Jatoi's argument. There, the judge actually imposed sanctions upon a defendant for waiting until trial had begun before settling the case, contrary to the court's prior threat to sanction the parties if they refused to settle at a comparable figure prior to trial. More accurately, the defendant in *Kothe* went ahead and settled at trial *despite* the threat of sanctions and not because of it. More importantly, the Second Circuit was not so much concerned with the trial court's efforts to settle the case, but rather with its choice of tactics to do so, the coercive threat of sanctions. Of course, the District Court engaged in no such conduct during this trial. The threat of sanctions never passed the Court's lips and it approached the issue of settlement carefully and courteously, even to the point of expressing to Jatoi its hesitance to bring it up. Tr.Vol. III-324.

A case much more on point is *Ullmann v. Olwine, Connelly, Chase, O'Donnell & Weyher*, 123 F.R.D. 253 (S.D. Ohio 1987), *aff'd*, 857 F.2d 1475 (6th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), which involved a claim for sex discrimination brought by an attorney against her former law firm. As in the case at bar, the *Ullmann* litigation proceeded to trial and near the end of the plaintiff's case, the magistrate hearing it inquired of both counsel if there was any possibility of settlement. Extended recesses were then taken and later in the afternoon a settlement was reached. The plaintiff explicitly stated on the record that she intended to settle. The case came before the district court on a subsequent motion by the defendants to enforce the settlement agreement. The plaintiff opposed enforcement of the settlement on various grounds, including that the settlement was coerced by the threat of sanctions and that she had insufficient time to consider the issues so that the settlement was not voluntary on her part. The *Ullmann* court rejected this argument, stating:

> Certainly thousands of cases in this country are settled every year after trial begins, and frequently it is the Court which initiates such discussions. *A suggestion of settlement discussions is not a threat of sanctions.* [Emphasis added.]

Id. at 259.

The court went on to observe that "if there was any objective coercion of plaintiff (as opposed to her subjective impressions), *it was from the circumstances in which she found herself.*" [Emphasis added]. The court pointed to the fact that the plaintiff's case had been poorly prepared for trial and was substantially undermined by her own

admissions on deposition and her failure to have key witnesses present or preserve their testimony. Much the same can be said here. Jatoi's settlement was a product of the virtual collapse of his case before the jury, and both he and his trial counsel were aware of it. As in the *Ullmann* case, Jatoi's after-the-fact subjective impressions that he was "coerced" by the District Court are a transparent effort to obtain a larger settlement.

Contrary to Jatoi's argument, the mere settlement of the case at the District Court's suggestion does not constitute a sanction sufficient to support a litigant's claim of a coerced settlement by that Court. Jatoi relies on *In re Ashcroft*, 888 F.2d 546 (8th Cir. 1989), to claim that his settlement was coerced by the District Court. However, the court's level of participation in settlement discussions in *Ashcroft* was much more pervasive than in the case at bar. There, the district court actually imposed the terms of settlement on the parties by informing them that "the Governor would be dismissed as a Defendant if he paid $500.00 in settlement to the Plaintiff." *Id.* Nevertheless, the Eighth Circuit indicated that if the case had actually settled, even this type of coercion "would disappear." Here, the District Court did not dictate terms of the settlement to the parties; rather, it encouraged negotiations to take place, negotiations in which the Court never directly participated. Tr.Vol. III-324.

At the time that the settlement between Jatoi, Amega and Aetna was entered into the record in the District Court, Jatoi had every opportunity to express his dissatisfaction with it. The court addressed a similar issue in *Broad v. Conway*, 675 F.Supp. 768 (N.D. N.Y. 1987), *aff'd*, 849 F.2d 1467 (2d Cir. 1988), *cert. denied*, 488 U.S. 927

(1988). In that case, the court held that the plaintiffs were estopped from raising the issue of coercion since at the time of entry of the settlement into the record, the court had questioned them as to their agreement and understanding of the settlement, and no objection had been raised at that time.

The same occurred here, and for the first time in these proceedings, Jatoi claims that, although he was present in the courtroom at the time the settlement was read into the record, he was not "with the group reading the settlement into the record but was 10-15 feet away" and may not have been fully informed about the actual settlement. This argument is preposterous. It is clear from the record that Jatoi, after encouragment from the Judge to consider settlement, gave his attorney the authority to settle and affirmed *on the record* that his attorney in fact had authority to do so. Tr.Vol. III-323 - 326. Jatoi himself indicated to the Judge that he wished to settle the case. Tr.Vol. III-326. Jatoi's attorney even made sure that Jatoi had read over the settlement to make sure it was acceptable. Tr.Vol. III-327. Clearly, Jatoi understood the settlement being entered into at the time. Raising even more doubt as to the veracity of Jatoi's assertions regarding settlement is Jatoi's contention that the Judge was not at the bench when the settlement was read into the record. Petition for Writ of Certiorari, 52. It is clear from the trial transcript that the Judge was directing the reading of the settlement and explicitly asked counsel to put the terms of the settlement into the record. Tr.Vol. III 328-329.

Moreover, once the terms of the settlement were read by counsel for Amega, the District Court, still on the bench, clarified them and explicitly informed all parties

that "this case in all respects will be dismissed tonight because we are going to be discharging the jury in the morning, and I don't want there to be any uncertainty about this lawsuit being concluded when we discharge that jury." Tr.Vol. III-332. The Court then went on to question each of the parties as to their understanding of the settlement. Jatoi explicitly affirmed that the statement of counsel for Amega and the Court's clarification accurately described the settlement. Tr.Vol. III-334. He gave no indication at that time that he had somehow been coerced into settling or could not understand or hear what was happening. Jatoi's settlement was not an ill-considered snap decision based on lack of understanding or auditory dysfunction. To allow him to renege on his agreement would undermine the integrity of the judicial system. The District Court's remarks as to settlement did not affect the substantial rights of Jatoi and were not an abuse of discretion sufficient to allow Jatoi to renege on his voluntary agreement.

Jatoi also argues that by instructing him as to his Fifth Amendment rights, the District Court intimidated him so that he was robbed of his ability to understand the settlement and was in effect coerced into entering into it. The District Court, having been in the best position to observe Jatoi's demeanor during the entire course of events at trial, quite rightly denied that motion. Jatoi made the same arguments on his appeal in 91-1086, which were found by the Fifth Circuit to be frivolous. This Court should likewise deny him relief. Under the authority cited above with regard to Fed. R. Civ. P. 61, the District Court's instructions do not affect the substantial rights of the parties, nor were they an abuse of discretion.

The Fifth Circuit has upheld on numerous occasions the authority of a United States District Judge to instruct a witness as to his Fifth Amendment right against self-incrimination. This is because the trial judge " . . . is present as the embodiment of the Constitution, and charged with the firm duty to see that the rights of all are upheld, including the parties, the witnesses and the public. Whether and to whatever extent it may be the duty of the trial judge to caution a witness about his fifth Amendment rights, a careful one never hesitates." *United States v. Wilcox*, 450 F.2d 1131 (5th Cir. 1971), *cert. denied*, 405 U.S. 917 (1972).

In this case, the Fifth Circuit correctly observed that the District Court did nothing more than fulfill its duties. A fair reading of the Court's voir dire of Jatoi simply illustrates a pattern of careful questioning in order to satisfy the Court that Jatoi in fact understood his rights. Tr.Vol. III-310-312. The need for additional questioning and instruction is obvious from Jatoi's somewhat rambling response to the Court at lines 16-22 of page 311. The District Court's actions exhibit an obvious concern over Jatoi's ability to understand his rights.

Moreover, contrary to Jatoi's post-trial contentions, it does not appear that Jatoi was in any manner pressured or intimidated by the Court's instructions to him on his Fifth Amendment rights. In point of fact, in response to the Court's instructions, he clearly stated that he intended to proceed and answer Mr. Wetzel's questions,

Tr.Vol. III-308 and, Jatoi never did have occasion to actually invoke his Fifth Amendment rights.[4]

Jatoi complains of other actions on the part of the District Court which he claims contributed to some sort of coercive atmosphere which forced him to settle. Jatoi complains that the District Court's threat of contempt and prevention of repetitious examination so intimidated his counsel that Jatoi was forced to settle.

The District Court's threat of contempt to Jatoi's counsel outside the hearing of the jury (Tr.Vol. II-103) was not error. *Steinberg v. United States*, 162 F.2d 120, 123 (5th Cir. 1947), *cert. denied*, 32 U.S. 808 (1947). Even after the threat of contempt, Jatoi's trial counsel continued to represent his client despite the glaring weaknesses of Jatoi's case and the fraudulent character of his client, which were emerging in front of the jury. Jatoi's counsel argued vigorously against the admission of evidence. Tr.Vol. III-207-209. He also argued against the lumping together of an unsigned change order with three signed change orders for purposes of calculating the unpaid balance of $1,067,121 due under the Jatoi-Amega Contract. Tr.Vol.

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[4] At pages 29-30 of his Petition, Jatoi paraphrases his recollections of his private conferences with his trial counsel, as set out in his Affidavit in Support of his Rule 60(b)(6) Motion. Apparently, Jatoi includes these excerpts in order to demonstrate what he believes to be inadequacy of his trial counsel team. However, these types of facts are not sufficient to justify the overturning of a voluntary settlement. Rather, if anything, they may support a cause of action on behalf of Jatoi against his trial counsel for malpractice. This issue is discussed *infra*.

III-214-216. Mr. Curtis also argued against the admissibility of the testimony of Dr. Allen Self, Amega's economics expert. Tr.Vol. III-228-241.

Jatoi makes much of a "serious conflict" which, he claims, developed between him and his counsel, citing Tr.Vol. III-179-180, and that Mr. Curtis "virtually abandoned" Jatoi to his former lawyer, Mr. Richard Trickey, who was present as a witness for Jatoi. Petition for Writ of Certiorari, 21-23 and 27-28. Again, Jatoi mischaracterizes the efforts of his former counsel. At page 179 of the transcript, Mr. Curtis explains to the Court that contrary to his advice, Jatoi desired to testify on his own behalf and as to matters which had already been excluded by the rulings of the Court. In addition, far from "abandoning" Jatoi to his former attorney, Mr. Trickey, Mr. Curtis simply asked for permission for Mr. Trickey to assist Mr. Curtis in advising Jatoi since he was obviously experiencing difficulty in controlling his client.

What Jatoi now chooses to term as "intimidation" of his counsel was actually a strategy by Mr. Curtis to prevent the possibility of further damage to his client through taking the stand on his own behalf and subjecting himself to further cross-examination. Despite his counsel's own advice, Jatoi insisted on testifying. Undoubtedly, the District Court shared some of the same concerns over the strength of Jatoi's case when it suggested to Jatoi that he consider acceptance of an outstanding settlement offer from Amega. Jatoi expressed his unwillingness to accept such an offer, and nevertheless the District Court assured him that he was going to "continue to hear Jatoi's case and keep an open mind, but that doesn't mean I am going to bend the rules." Tr.Vol.

III-186. The Court then gave Jatoi additional time to discuss settlement with his counsel. Still, Jatoi declined to settle. Tr.Vol. III-186-187. Unfortunately for Jatoi, the continuation of the trial only confirmed the wisdom of his counsel's advice both as to not taking the stand and settling the case.

Jatoi complains that the District Court's efforts to streamline the trial by preventing repetitious or cumulative testimony ultimately had the effect of adding to the intimidation of Jatoi's counsel. Petition for Writ of Certiorari, 16.

From the outset, the District Court made clear its intention to move the trial proceedings along. It instructed all counsel prior to voir dire that repetitious and cumulative testimony would not be allowed. Tr.Vol. I-55-56. At the same time, the District Court was sensitive to the impact that its efforts to control the proceedings might have on the jury and it carefully instructed the jury that any of its rulings or admonishments of counsel should not affect their evaluation of the merits of the case. Tr.Vol. I-161-162. Thus, all concerned were put on notice of the Court's intention to actively exercise its discretionary power to control the trial in order to avoid needless waste of the jury's and Court's time.

A federal judge's latitude in controlling the trial is codified in F.R. Evid. 611(a) which provides:

> (a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3)

protect witnesses from harassment or undue embarrassment.

The Fifth Circuit addressed the scope of a district court's powers in this regard on numerous occasions. In *Liner v. J. B. Talley & Co.*, 618 F.2d 327 (5th Cir. 1980), *reh. denied*, 623 F.2d 711 (5th Cir. 1980), it upheld the trial court's broad discretion to exclude even relevant testimony if it is cumulative or repetitious, stating that where an appellant made no offer of proof as to excluded testimony, "error may not be predicated on its exclusion." Here, no offer of proof was ever made by Jatoi's counsel so that Jatoi is precluded from complaining of any abuse by the District Court of its discretion since Jatoi's failure to object prevented the court from remedying the situation at that time. *Reese v. Mercury Marine Div. of Brunswick, Corp.*, 793 F.2d 1416 (5th Cir. 1986), *reh. denied*, 797 F.2d 977 (5th Cir. 1986).

There was clearly no plain error in the District Court's adherence to the rule against repetitious and cumulative testimony. Thus, the Fifth Circuit correctly ruled that there had been no overreaching by the District Court. *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *opinion amended in part, vacated in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422 (5th Cir. 1990).

Although the District Court maintained control of the proceedings below, it exercised its control evenly and fairhandedly among all parties, including its admonishments of counsel. In *United States v. Hawkins*, 661 F.2d 436 (5th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982), the defendants made the same claim that Jatoi makes here, that is

that the trial court exhibited bias and interfered with their case through admonishments of counsel. However, the court refused to find that the trial court had erred where it "did not limit its admonishments to defense counsel as defendants contend, but chided the prosecutor on several occasions for various conduct." *Id.* at 450. The court also relied on the fact that most of the court's arguments with counsel took place during bench conferences, out of the hearing of the jury.

Jatoi sets out a string of citations to the transcript implying that Judge McBryde enforced the rule against repetitive and cumulative testimony unfairly and to the detriment of Jatoi. Petition for Writ of Certiorari 20-21. Actually, the transcript as a whole indicates that the Court's rule against repetitious and cumulative testimony was enforced with equal vigor as to all parties. *See* Tr.Vol. I-224-225; II-45,-104,-177-180,-187,-191,-293-295; III-283,-322.

This Court has denied certiorari even in a case in which the district court's conduct and remarks before the jury could have resulted in a litigant's counsel foregoing objection for fear of antagonizing the court and thereby prejudicing a client's case. *See, Miley v. Delta Marine Drilling Co.*, 473 F.2d 856 (5th Cir. 1973), *cert. denied*, 414 U.S. 871 (1973) (no error where trial court criticizes counsel's question to the extreme that "any five year old idiot knows that. Don't waste my time and the jury's time on that.") Here, even when admonishing counsel, the District Court was courteous and respectful to both the litigants and their counsel.

Assuming, *arguendo*, that Jatoi's counsel was in fact intimidated to the point that he was unable to adequately represent the interests of his client, Jatoi's remedy is not a new trial at the expense of Aetna and Amega, but rather a malpractice action against his former counsel.[5] The merits or demerits of an attorney's representation of his client in a civil action are not grounds for invalidating a verdict and any relief which a party may receive must come in a separate action for damages against his counsel. *Bury v. McIntosh*, 540 F.2d 835 (5th Cir. 1976), *reh. denied*, 543 F.2d 756 (5th Cir. 1976). The Fifth Circuit followed this view in *Pryor v. U.S. Postal Service*, 769 F.2d 281 (5th Cir. 1985) (plaintiff's remedy for his counsel's mistakes or omissions which led to dismissal of employment discrimination action for want of prosecution was to seek malpractice damages from counsel, not the granting of relief from the judgment). Here, Jatoi voluntarily chose his counsel and his sole remedy for what really amounts to an after-the-fact critique of his trial counsel by his new counsel is a malpractice action.[6]

Many of the complaints of Jatoi against his counsel have been the result of his inability to maintain a continuity of representation throughout these proceedings. Jatoi

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[5] In making this argument by no means does Aetna or its counsel intend to suggest that Jatoi's trial counsel committed malpractice. To the contrary, in light of the weakness of his client's case, the $150,000 settlement he obtained for Jatoi was an extremely favorable result under the circumstances.

[6] In fact, Jatoi has filed a malpractice claim against the firm of Decker, Jones, McMackin, McClane, Hall & Bates, in his counterclaim in an action brought by that firm for collection of fees from him.

is now without counsel after having six previous attorneys. The record establishes that no fewer than five counsel have previously represented Jatoi with regard to this dispute: Mr. Richard Trickey (Tr.Vol. III-257); Mr. William Peters (Tr.Vol. III-317-318); Mr. William C. Meier, prior counsel of record before this Court; Mr. James Curtis, counsel who tried the case, and Mr. Michael Mosher, counsel who filed the Rule 60(b)(6) Motion and Jatoi's first appeal to this Court.

Aetna and Amega should not be subject to further prejudice by a new trial where the true squabble, if one exists, is between Jatoi and his former trial counsel. Under these circumstances, Jatoi should not be allowed to escape the consequences of his voluntary settlement by means of a reversal of the Fifth Circuit's opinion dismissing the appeal. Justice cannot be served granting him the relief he seeks.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT WAS CORRECT IN DENYING THE APPEAL OF JATOI'S RULE 60(b) MOTION AND SANCTIONING JATOI FOR FILING A FRIVOLOUS APPEAL SINCE THE BASIS OF THE MOTION WAS THE SUBJECT OF A PRIOR APPEAL

In his Petition for a Writ of Certiorari, Jatoi complains that the Fifth Circuit improperly dismissed the appeal of his Rule 60(b) Motion and, through the imposition of sanctions, violated his constitutional right to redress of grievances through the court system.

If the frivolous appeal of the judgment entered pursuant to a voluntary settlement itself is not sufficient grounds for the assessment of sanctions against Jatoi, the fact that the second appeal involved the same issues as the first clearly dictated that the Fifth Circuit's actions were appropriate. In fact, in the first appeal, the Fifth Circuit found that many of Jatoi's arguments were frivolous the first time they were made.

Just as he did in filing the second appeal (No. 91-7003), Jatoi raises the identical issues in this Petition for a Writ of Certiorari as he did in his first appeal (No. 91-1086) and in the appeal of Alcina Jatoi's Rule 60(b) Motion (No. 92-1057). Neither the sanctions imposed by the Fifth Circuit nor the threat of additional sanctions if another appeal was taken has had any effect on Jatoi. He has blatantly ignored both the warning and the sanctions in filing this Petition for a Writ of Certiorari.

Federal Rule of Appellate Procedure 38 gives the courts of appeal great latitude to award damages in the event of a frivolous appeal. In *Burlington Northern Railroad v. Woods*, 480 U.S. 1 (1987) this very court, citing the advisory committee's notes on the rule, stated that " 'damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.' " *Burlington Northern R.R.*, 480 U.S. at 4. Accordingly, the Fifth Circuit Court has not hesitated to assess penalties against an appellant for prosecuting a frivolous appeal, including the assessment of attorneys' fees pursuant to Rule 38. *Foret v. S. Farm Bureau Life Ins. Co.*, 918 F.2d 534 (5th Cir. 1991); *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988).

A case similar to this one is *Clarion Corp. v. Am. Home Prod. Corp.*, 494 F.2d 860 (7th Cir. 1974), *cert. denied*, 419 U.S. 870 (1974). That case, like this one, involved the second appeal by a stubborn litigant of a judgment entered pursuant to a voluntary settlement. As does Dr. Jatoi here, the appellant in *Clarion* claimed that the settled case had been mishandled by his former counsel. In noting that the case was the third appeal of the same issues, the court assessed sanctions noting that the appellant's course of action "has been frivolous and obstructive and has caused a shameful waste of judicial manpower." *See also, Trecker v. Scag*, 747 F.2d 1176 (7th Cir. 1984), *cert. denied*, 471 U.S. 1066 (1985) (assessing attorneys' fees and double costs as penalties against appellant's counsel for frivolous appeal, the second appeal in that matter).

Unfortunately, the Fifth Circuit's imposition of sanctions has done little to dissuade Jatoi from further appeal. To date, Jatoi has not even paid the sanctions awarded by the Fifth Circuit. Perhaps this Court's denial of the Petition for a Writ of Certiorari will, once and for all, put an end to the waste of time and money, not to mention judicial resources, suffered by the parties as a result of Jatoi's harassment. Therefore, Aetna respectfully requests that this Court specifically affirm the Fifth Circuit's opinion of July 21, 1992, awarding it $6,298.50 in sanctions against Dr. Jatoi for his blatant manipulations of the United States judicial system.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit was correct when it dismissed Jatoi's appeal and sanctioned him. Jatoi has had more than his fair share of opportunities to have his grievances addressed by the judicial system. On two occasions the Fifth Circuit reviewed the issues and the facts and found that the District Court acted properly during the trial and that the voluntary settlement entered into by Jatoi should stand. In dismissing the appeal, the Fifth Circuit quite appropriately found that the second review of the same facts and issues was enough. Respondent Aetna respectfully requests that this Court deny the Petition for a Writ of Certiorari and for such other relief to which the Court should find Aetna entitled, including specific affirmation of the Fifth Circuit's sanctions against Jatoi.

Respectfully submitted,

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Counsel of Record

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APPENDIX A

ALIMADAD JATOI, et al v. AMEGA CONSTRUCTION, INC., et al

July 1985 - Amega v. Alimadad & Alcina Jatoi and the Jatoi Partnership
236th Judicial District Court of Tarrant County, Texas

June 1987 - Jatoi files Third Party Claim v. Aetna

August 4, 1987 - Jatoi files Bankruptcy, Case Removed to Federal Court

April 15, 1988 - Withdrawal of Reference from Bankruptcy, Placed on District Court Docket

November 5, 1990 - Trial begins - US District Court, Northern District

NOVEMBER 7, 1990 - VOLUNTARY SETTLEMENT

NOVEMBER 8, 1990 - COURT ORDER ENTERED

CASE NO. 1086	CASE NO. 7003	CASE NO. 1057
11/19/90 Motion for New Trial filed by Jatoi	5/22/91 Rule 60(b) Motion Filed by Jatoi	11/5/91 Rule 60(b) Motion filed by Alcina Jatoi
12/17/90 Motion for New Trial Denied	6/25/91 Rule 60(b) Motion Denied	12/18/91 Rule 60(b) Motion Denied
1/16/91 Appeal to Fifth Circuit	7/1/91 Motion for Reconsideration filed by Jatoi	1/15/92 Notice of Appeal filed in Fifth Circuit
8/23/91 Fifth Circuit Affirms Denial of Motion for New Trial	8/8/91 Motion for Reconsideration Denied	4/23/92 Motion to file brief out of time Denied by Fifth Circuit
11/18/91 Extension of Time to file Petition for Writ of Cert with Supreme Court Denied	10/21/91 Notice that Record filed for Appeal	7/23/92 Time to file Petition for Writ of Cert with Supreme Court Expired
E N D	3/10/92 Brief filed with Fifth Circuit by Jatoi per extension of time	E N D
	4/10/92 Motion for Dismissal and Sanctions by Amega & Benedict	
	4/13/92 Motion for Sanctions by Aetna Ins. Co.	
	6/30/92 Appeal Dismissed Jatoi Sanctioned	
	11/92 Actual filing of Petition for Writ of Certiorari by Jatoi	
	12/23/92 Sanctions Remain Unpaid	

App. 1

APPENDIX B

WINSTEAD
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December 10, 1992

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO. P088 395 628

Ms. Ruth Jones
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Re: No. 92-898; Dr. Alimadad Jatoi, Dr. Alcina F. Jatoi and Jatoi Partnership v. Amega Construction, Inc. and Aetna Insurance Company; In the Supreme Court of the United States

Dear Ms. Jones:

This letter is in confirmation of our telephone conference on November 25, 1992 in the above-referenced matter. You will recall that the undersigned represents Aetna Insurance Company, a Third Party Defendant and Appellee. In that telephone conference, you indicated to me that the Court had accepted Dr. Jatoi's petition for a Writ of Certiorari with regard to only one of the appeals from the Fifth Circuit, that is Case No. 91-7003. It is my further

understanding that his petition was rejected as untimely as far as it attempts to appeal from the decisions of the Fifth Circuit Court of Appeals in Case Nos. 91-1086 and 91-1057. Therefore, it is only necessary for my client to respond to the aspects of Dr. Jatoi's petition which deal with Case No. 91-7003.

Finally, it is my understanding that Aetna's time for responding to Dr. Jatoi's petition will run from the date of receipt of Dr. Jatoi's Petition as redrafted to comply with Supreme Court Rules.

If the above does not meet with your understanding of the status of Dr. Jatoi's Petition, please contact the undersigned immediately.

Yours very truly,

Patrick J. Wielinski

PJW:kz

cc: Mr. Dan Vincinzo
Dr. Alimadad Jatoi
Aetna Insurance Company
Michelle I. Rieger (of the firm)